cases of keeping vicious animals,[9] and to keeping in the fumes of a gas factory, even though the factory be operated under a municipal ordinance and the best modern appliances used.[10] But Fletcher v. Rylands was not cited in either of these last two cases, and its large rule was not implied therein, for the first case rests upon ancient rules concerning the keeping of wild or of vicious domesticated animals;[11] and relief in the second case was founded on the doctrine of nuisance.

Due to the necessity in this state of the use of artificial ponds and waterways in mining and agriculture, the question of the liability of the owner was raised at an early date. The rule laid down at that time and consistently followed is that a man is liable for the want of such care in the building and maintenance of ditches and reservoirs as an ordinarily (not "a very"[12]) prudent man would exercise if he were the owner of the land below and the risk were all his own.[13] *H. V. D.*

VENDOR AND VENDEE: RISK OF LOSS ON VENDOR: RIGHT OF RESCISSION BY VENDEE: EQUITABLE CONVERSION.—Does the mere signing of a contract for the conveyance of real property shift the burden of the risk of loss to the purchaser? The prevailing rule[1] says yes; the buyer must pay in full for the property even though a fire occurring before the deed is delivered has left naught but ruins. The rule in California, however, holds the contrary, and permits the buyer to rescind the contract if a substantial part of the property has been destroyed. Waiver of this right of rescission is good consideration for the seller's promise to rebuild, according to the case of *LaChance v. Brown*.[2]

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[9] Gooding v. Chutes Co. (1908) 155 Cal. 620, 102 Pac. 819, 23 L. R. A. (N. S.) 1071.

[10] Judson v. L. A. Suburban Gas Co. (1910) 157 Cal. 168, 106 Pac. 581, 26 L. R. A. (N. S.) 183.

[11] May v. Burdett (1846) 9 Q. B. 101, 115 Eng. Rep. R. 1213; Laverone v. Mangianti (1871) 41 Cal. 138, 10 Am. Rep. 269.

[12] Wolf v. St. Louis Water Co. (1858) 10 Cal. 541, 545.

[13] (a) Cases of damage from the breaking of ditches and reservoirs: Tenney v. Miner's Ditch Co. (1857) 7 Cal. 335; Hoffman v. Tuolumne Water Co. (1858) 10 Cal. 413; Todd v. Cochell (1860) 17 Cal. 98; Everett v. Hydraulic etc. Co. (1863) 23 Cal. 225; Weiderkind v. Tuolumne Water Co. (1884) 65 Cal. 431, 4 Pac. 415; Moore v. San Vincent Water Co. (1917) 175 Cal. 212, 165 Pac. 687; Bacon v. Kearney Vineyard Syndicate (1905) 1 Cal. App. 275, 82 Pac. 841; Stapp v. Madera Canal & Irr. Co. (1917) 34 Cal. App. 41, 49, 166 Pac. 1017.

(b) Damage from overflow or leakage of ditches and ponds in cases where there was no breaking: Campbell v. Bear River etc. Co. (1865) 35 Cal. 679; Parker v. Larsen (1890) 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30 (there is no specific mention of negligence here, but it is found that the harm could have been averted with a little expense and trouble); Chidester v. Consolidated Ditch Co. (1881) 59 Cal. 197, 202.

[1] Paine v. Meller (1801) 6 Ves. Jr. 349, 31 Eng. Rep. R. 1088, is the leading English case and it has been followed in most of the courts of the United States. See 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 5067. Also Clark on Equity, pp. 156-160.

[2] (June 9, 1919) 28 Cal. App. Dec. 1350, 183 Pac. 216.

California courts declined to follow the prevailing doctrine as early as 1891, when in Smith v. Phoenix Insurance Company[3] the vendor was held to bear the risk of loss by fire. Conlin v. Osborn[4] bases the departure on that section of the California Civil Code[5] which provides that "a party to a contract may rescind the same . . . if such consideration . . . fails in a material respect from any cause."

In the principal case the vendee was in possession. But "the fact that he went into possession does not make the rule any the less applicable."[6] This is opposed to the test laid down by Professor Williston,[7] who would make possession determine whether the seller or the buyer should bear the risk, though it has been suggested that California showed a tendency toward the maintenance of such a rule.[8] Williston believes this test would encourage care, but as shown by Professor Keener,[9] the negligent person is liable in any event. Besides, the possession principle cannot aid in a situation like Cooper v. Huntington,[10] where a buyer in possession was allowed rescission upon the washing away by flood of four out of ten acres. The Civil Code, moreover, places no emphasis on the fact of possession.[11]

It has been stated that a vendee in possession has the whole beneficial interest in the property, and that the vendor has only the naked legal title.[12] The naked legal title, however, confers many powers, rights and liabilities on the vendor. He has the power, though not the right, to sell to a bona fide purchaser for value

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[3] (1891) 91 Cal. 323, 27 Pac. 738, 25 Am. St. Rep. 191, 13 L. R. A. 475. The court here expressly approves of cases making the vendor bear the loss, though the vendee is in possession. But in introducing a review of cases cited by appellant as throwing loss on vendee, the court says "no case has been cited . . . in which the vendee has been held bound . . . unless he has taken possession." It then proceeds to disapprove or distinguish the cases where the vendee in possession is held to the loss. Its position is clear, yet the form of the introduction to the review has led the California courts in at least one case into saying by way of dictum that the vendee in possession should take the risk. Finkbohner v. Glen Falls Ins. Co. (1907) 6 Cal. App. 379, 385, 92 Pac. 318. However, both the Smith and Finkbohner cases, like other insurance decisions, depend on stipulations in insurance policies and are of little direct value on the general problem. See also Sharman v. Continental Ins. Co. (1914) 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670, and comment thereupon at 1 California Law Review, 387.

[4] (1911) 161 Cal. 659, 120 Pac. 755. See 1 California Law Review, 387; 4 California Law Review, 79.

[5] § 1689, subd. 4.

[6] Chipman, P. J., in Wong Ah Sure v. Ty Fook (1918) 26 Cal. App. Dec. 1145, 174 Pac. 64. Rehearing denied by Supreme Court, Aug. 1, 1918.

[7] 9 Harvard Law Review, 106.

[8] 4 California Law Review, 79; 1 California Law Review, 387.

[9] 1 Columbia Law Review, 1.

[10] (1918) 178 Cal. 160, 172 Pac. 591.

[11] § 3050 gives the purchaser "a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration". Cal. Code Civ. Proc., § 688, makes any interest in real property liable to seizure on execution, and Fish v. Fowlie (1881) 58 Cal. 373, interpreted this section to permit levy on the interest of a purchaser not in possession.

[12] 9 Harvard Law Review, 106, 125.

without notice,[13] he must pay taxes,[14] he may get an injunction against waste by the vendee,[15] and he has an insurable interest.[16] If the seller retains legal title he may transfer such security merely by assigning the buyer's purchase-money note;[17] if he does not retain title, his vendor's lien is non-transferable.[18] It is more accurate to say that the seller remains owner subject to the vendee's right to compel him specifically to convey. A buyer gets possession only when it is made part of the bargain. Should the burden of the risk be thrown on him merely because he stipulates for this right in the contract?

In California risk follows legal title irrespective of possession, a doctrine which is of course not confined to contracts concerning realty. In Potts Drug Co. v. Benedict[19] the vendee of a leasehold, a chattel real, to whom legal title had been passed, was held to suffer the loss by fire even though the seller was in possession. And a purchaser in possession of a newpaper route may recover advance payment therefor upon the suspension of the paper, title having remained in the vendor.[20] So, a buyer in possession of a safe under a contract of conditional sale does not bear the loss resulting from its accidental destruction.[21]

The only reason given why the vendee must pay for ashes under the prevailing doctrine is the fiction of equitable conversion.[22] Under this principle the buyer is considered in equity the owner of the property. But Professor Stone[23] points out the real meaning of this doctrine when he says that it "depends upon the question whether the contract should in equity be performed. . . . Equity will not compel a defendant to perform when it is unable . . . to compel the plaintiff to give in return substantially what he has undertaken." Since, then, there can be no specific performance after a destruction of a substantial portion of the property, there should be no conversion.

The logic on which is based the generally prevailing rule is a striking example of reasoning in a circle. It considers equitable conversion the cause of specific performance, whereas conversion is really the consequence thereof. The California rule is not influ-

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[13] 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 5062.

[14] Cal. Pol. Code, § 3627.

[15] 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 5065.

[16] White v. Gilman (1903) 138 Cal. 375, 71 Pac. 436. Vendor here was allowed to insure house built by the vendee in possession, and to keep the insurance proceeds.

[17] 5 Pomeroy, Equity Jurisprudence (4th ed.) p. 5063.

[18] Gessner v. Palmateer (1891) 89 Cal. 89, 26 Pac. 789, 13 L. R. A. 187. See Cal. Civ. Code, §§ 3046, 3047. Pomeroy, at Vol. 3, p. 3039, says the lien should be called a grantor's lien after title has passed. But both the court and code in California call it a vendor's lien.

[19] (1909) 156 Cal. 322, 104 Pac. 432.

[20] Kirtley v. Perham (1917) 176 Cal. 333, 168 Pac. 351.

[21] Waltz v. Silviera (1914) 25 Cal. App. 717, 145 Pac. 169; commented upon in 3 California Law Review, 166.

[22] Pomeroy as cited, supra, n. 1.

[23] 13 Columbia Law Review, 369, 386. See also 12 Columbia Law Review, 257.

enced by this equitable legerdemain. Emphasis is laid on the contractual relations of the parties. Indeed it seems to have been the intention of the code makers to do away with the theory of equitable ownership.[24] Resort to the old rule of the English Chancery under the circumstances would be an anachronism. In fact "the doctrine of equitable conversion seems to be rarely invoked in California; the tendency seems to be toward applying legal doctrines rather than equitable ones to the treatment of contracts for the sale of land."[25] *J. C. S.-J. J. P.*

WATER RIGHTS: SURFACE WATERS: SIMILARITY OF COMMON LAW AND CIVIL LAW.—When surface waters flow naturally from upper to lower land, can the lower owner obstruct the flow or force it back to the upper land? Two general rules prevail. One gives the upper owner the right of natural flow or discharge; the other does not, and permits the lower owner to obstruct the flow.

Castro v. Bailey,[1] the earliest California case on this point, committed us to the former rule; and in so doing, according to Chief Justice Beatty,[2] followed the doctrine of the civil law, erroneously thinking it to be the common law. And though the court would not overrule the case, the decision having become a rule of property, the chief justice did attempt to bring California back to what he called the common law by limiting the doctrine of Castro v. Bailey to surface waters strictly,[3] making an exception in the case before him to permit the lower owner to fight off flood waters. That was the first exception.[4] The next[5] was as to water forced back because of surface changes on city lots. Now the case of *Coombs v. Reynolds*[6] indicates a further exception in the situation where water is thrown back in the course of normal farming operations free from negligence.

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[24] Cal. Civ. Code, § 863. "Every express trust . . . . vests the whole estate in the trustees. . . . . The beneficiaries take no estate or interest in the property." Similarly a mortgagee has only a lien.

[25] Orrin K. McMurray in 7 California Law Review, 454.

[1] (1869) 1 Cal. Unrep. Cas. 537. The first reported case is Ogburn v. Connor (1873) 46 Cal. 346, 13 Am. Rep. 213, which cites Castro v. Bailey. See also Sanguinetti v. Pock (1902) 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; and Gray v. McWilliams (1893) 98 Cal. 157, 32 Pac. 976, 35 Am. St. Rep. 163, 21 L. R. A. 593.

[2] McDaniel v. Cummings (1890) 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575.

[3] "Water spread upon the surface of land, or contained in depressions therein, and resulting from rain, snow, or like causes, if not flowing in a fixed channel, so as to constitute a water course, is known as *'surface water'*." Tiffany on Real Property, p. 1903. Flood water is the extraordinary overflow of rivers and streams.

[4] An earlier case is Lamb v. Reclamation District (1887) 73 Cal. 125, 130, 14 Pac. 625, 2 Am. St. Rep. 775.

[5] Los Angeles Cemetery Assn. v. Los Angeles (1894) 103 Cal. 461, 467, 37 Pac. 375; Lampe v. San Francisco (1899) 124 Cal. 546, 57 Pac. 461, 1001; Jaxon v. Clapp (1919) 30 Cal. App. Dec. 1007; dicta.

[6] (Oct. 20, 1919) 30 Cal. App. Dec. 252, 185 Pac. 877. The problem often arises when it is the lower owner that interferes with the normal flow of surface waters. Here the interference arose because furrows left by plowing on the upper land increased the normal flow. But the principle is the same. See also Wood v. Moulton (1905) 146 Cal. 317, 80 Pac. 92.